

GRAND RIVER | SOLUTIONS

Hearings 201 Day Ready, Set, Go! Two

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10/2/2020

Your Facilitator



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Co-Founder and Managing Director

Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Jody received her J.D. from the University of California, Hastings College of Law and her bachelor's degree from Georgetown University's School of Foreign Service.



Overview of the Morning

01

Let's Practice!

05

How do I know which Questions to Ask?

02

Evidentiary Issues

06

Framing Questions

03

Hearing Advisors

07

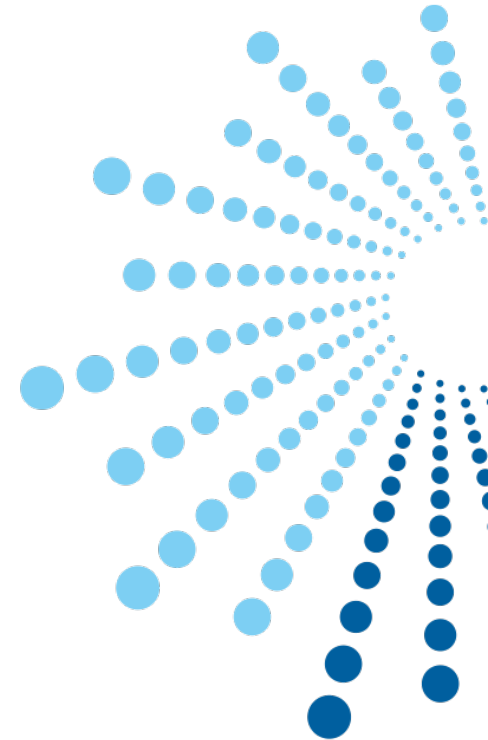
Practical Application

04

Being an Effective Hearing Advisor

08

Appeals & Common Errors on Appeal



Recap and Practice

Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence



Break Out!

#1

Say hi!

Pick a scribe

Discuss

- Develop Questions for Witnesses

Come back prepared to discuss

- I will call on each group one by one



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Report Out

Break Out!

#2

Say hi again

Pick a scribe

Discuss

- Make determinations on questions and cite rationale
- Group 1: Questions for Complainant
- Group 2: Questions for Respondent
- Group 3: Questions for Bob, Dylan, Stevie
- Group 4: Questions for Nick, Kayla, Caitlyn

Prepare to report back



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Report Out



Evidentiary Issues

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02

Evidence:

Is it . . .

Relevant

Reliable?

Does it matter (is it due any weight)?

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Relevance Is Not . . .

Strength of the
evidence

Believability of
the evidence

Based on type
of evidence:
circumstantial,
direct

Based on
complicated
rules of court

What about

News article that colleges are failing complainants

News article that colleges fail to provide due process, are biased

News article about a related criminal case



What about

Polygraph examination

Private investigator's interview notes

Declarations submitted under penalty of perjury



What about

An expert report discussing low incidence of false reports

An expert report discussing bias against male complainants

An expert report on reasons why blackouts are not evidence of incapacitation

What about

News article that colleges are failing complainants

News article that colleges fail to provide due process, are biased

News article about a related criminal case





Hearing Advisors

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There are
two types of
advisors

Advisor (throughout whole process)

Hearing Advisor (hearing, for
poses of asking questions)

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Hearing Advisor

“Such advisors need not be provided with specialized training or be attorneys because the essential function of such an advisor provided by the recipient is not to “represent” a party but rather to relay the party’s cross-examination questions that the party wishes to have asked of other parties or witnesses so that parties never personally question or confront each other during a live hearing.” 85 Fed. Reg. 30562 (May 19, 2020).

For the Limited Purpose of Asking Questions

It is in the school's discretion to restrict advisor's active participation in the proceeding, except when it comes to asking questions of parties or witnesses (also referred to as cross examination).



Being an Effective Hearing Advisor

Before the Hearing

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Make the Party Aware that . . .

- You are under no obligation to keep the information confidential
 - There is no attorney client relationship nor any other recognized privilege between you and the party
 - You are not under an obligation to keep what the party tells you confidential
- Were this matter go to a court of law, and you were asked to testify, you would have to do so, truthfully
- Do this at the outset

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Exactly, What Type of Homework?

- Familiarize yourself with investigative report
- Understand the ends and outs of the report
- What is the timeline of events
- Think about what areas you may want to highlight or expand upon
- What type of questions you will ask
- Who are the key witnesses



How do I Know which Questions to Ask?

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Identify the Claims, What Needs to be Proven

- Why are we here?
- What are the elements for the charge?
- What are the definitions of those elements?
 - Consent?
 - Incapacitation?

What do I Want to Show?



Credibility?



Clarification on timeline?



The thought process?



Inconsistencies?

Foundational Questions to Always Consider Asking

Were you interviewed?

Did you see the interview notes?

Did the notes reflect your recollection at the time?

As you sit here today, has anything changed?

Did you review your notes before coming to this hearing?



Framing Questions

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Do you want to highlight or expand?

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Highlighting

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Expanding

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Not a Court of Law

Not making complex legal arguments

Are not treating parties with hostility

Rules of evidence outside of Title IX regulations do not apply

Not looking for the “gotcha” moment

Treat the Party or Witness with Respect

Do not harass
or badger the
party or witness

This is not “Law
and Order”

Be calm and
speak clearly



Practical Application

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Scenario #1: You are advisor for Respondent

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Scenario #1

- Complainant's capacity to consent is an issue:
- Witness A stated to the investigator that they thought they saw Complainant have a few drinks and that complainant "might have been drunk." Witness A believes that Complainant was drunk as Witness A has been around Complainant many times when Complainant is drunk. Witness A is now on cross examination. What question(s) will you ask?

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Think About . . .



What information could be helpful for the respondent



Are you looking to expand on or simply highlight



How are you going to ask the question

Scenario #2: You are advisor for Complainant

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Scenario #2

- Witness B stated to the investigator they saw Complainant leave the party with Respondent. Before Complainant and Respondent left, Witness B saw Complainant fall and Respondent had to help Complainant up. Witness B stated they have known Complainant for five years, and when Complainant is drunk, Complainant is unable to control their motor functions. Witness B is now on cross examination.

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Think About . . .



What information could be helpful for the respondent



Are you looking to expand on or simply highlight



How are you going to ask the question

Scenario #3: You are the advisor for Respondent

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Scenario #3

- Witness C is the roommate of the Respondent. Witness C stated to the investigator that when Complainant entered Witness C's and Respondent's apartment that Complainant was not visibly intoxicated, was very coherent, and able to have lengthy conversations about complex subjects. However, unbeknownst to you Witness C and Respondent have had a falling out. When Witness C is in the hearing, they say they will only answer questions from the hearing officer. You are the advisor for the Respondent, what questions will you ask?

Think About . . .



What information could be helpful for the respondent



Can this parties' statements come in



Are you going to ask any questions



Appeals

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08

Notification of the Appeals Process

Who Gets Notified

- Complainant
- Respondent
- Student Conduct?
- Human Resources?
- Academic personnel?

What They are Notified Of

- Allegations
- Investigation Outcome
- Applicable Policy
- Appeals Process
- Timeline
- Links
- Dates
- How to submit

Whose Job Is It?

Receive	Receive the appeals
Determine	Determine whether the grounds for appeal have been met
Notify	Notify the person(s) responsible for reviewing the appeal
Arrange	Arrange the logistics for the appeal
Communicate	Communicate with complainant and respondent and advisors and witnesses as appropriate



Differences in Burden

COLLEGE/
UNIVERSITY

Figure out what happened and get to the truth of the matter, & error correction

COMPLAINANT
RESPONDENT

Persuade and point out error with supporting evidence or facts



Has the Burden Been Met?

Review the information provided by Complainant and/or Respondent and determine whether it contains sufficient information concerning the grounds for appeal and the reasons related to those grounds

This step is not to decide the merits of the appeal, but to identify the nature and scope of the issues to be addressed.

What Does This Mean?

- You are reviewing the appeal for what it says, not how it is said.
- You are identifying what the party says went wrong in the process or whether the party has identified new information and IF the party has articulated that what went wrong or what is new, if true, would have led to a different outcome.



The Typical Grounds for Appeal

Procedural

- Bias/conflict of interest
- Error

New information

Affected the outcome

Bias



- What constitutes bias?
- The investigator was biased against me because...
- The investigator was biased against (complainants/respondents generally) because . . .

New Information

- Is it really new?
- If it is new, would it change the findings/outcome
- Who investigates new information?
- Timeline



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What Would You Do?

Appeal states there is
new evidence...

Evidence not
provided with the
appeal

How do you know it
is new?

It is new but is it
relevant and
reliable?

In Short



Title IX



Appeal Officer(s)

Dear Appeals Officer...

I am the victim of a false accusation...

- ❖ The police were not contacted and I was not charged by law enforcement with a crime
- ❖ After the supposed sexual assault, she sent me a friend request on Instagram and asked me to dance at a party
- ❖ No one listened to my explanation or reviewed the evidence so they could see that I was falsely accused.

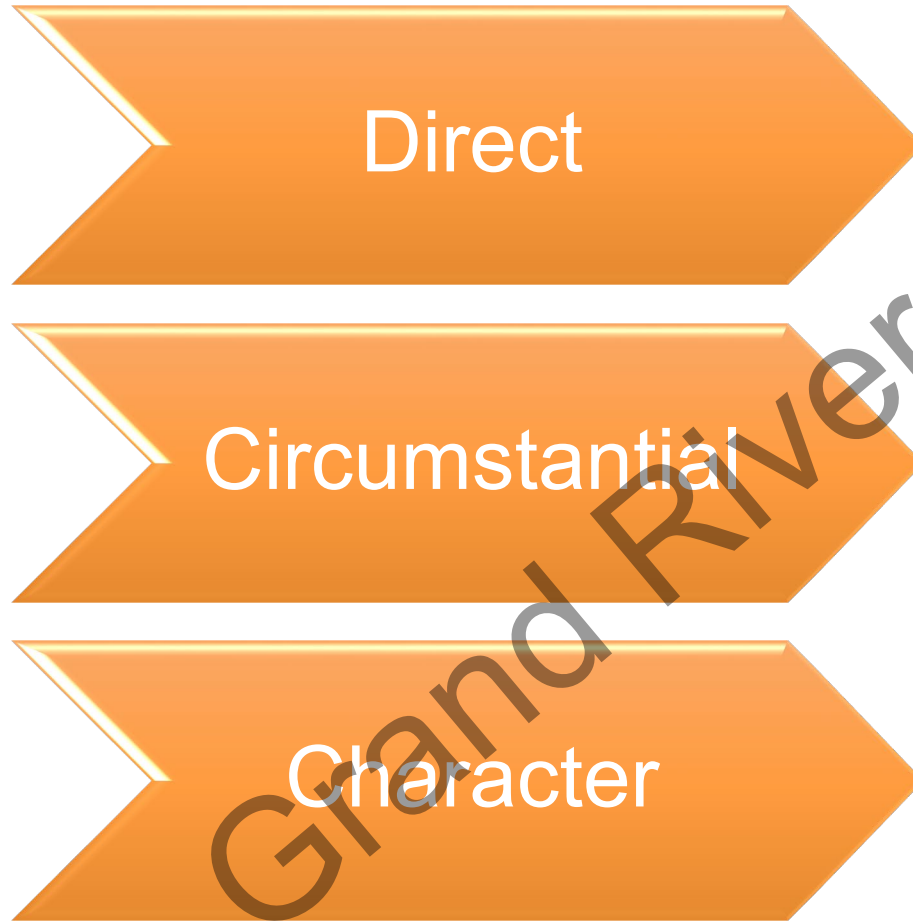


Common Errors on Appeal

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Evidence



Evidence – Knowing What to Consider

Drunk vs. Intoxicated vs.
Incapacitated

Language matters

Clarity and consistency of application

Who has to prove
consent?

Know the language of your policy

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Standard of Proof

Is there a standard of proof
for appeals?

Problematic Processes

Whether it is part of your official or unofficial process

- Stipulations
- Legal procedures
- Unintended consequences of assisting one or more parties with drafting the appeal

DANGER

**DO NOT
ENTER**

De Novo
Appeals

Appeals Panels That Exceed Their Authority

- Who handles
- How do you know
- How to correct

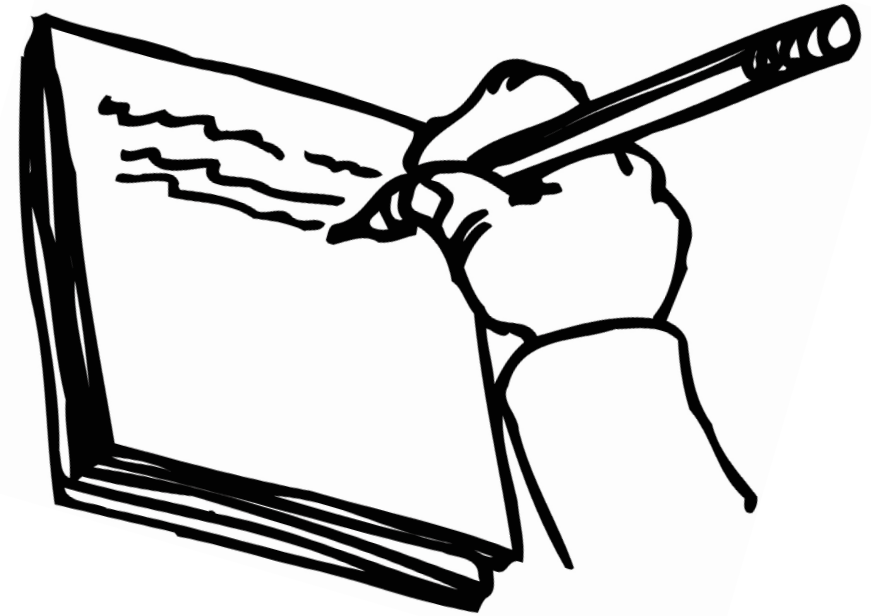


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Dear Appeals Officer...

I am the victim of a false accusation. Something went terribly wrong.....



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Procedural Error

There was a procedural error in the process that materially affected the outcome.

- Someone was not interviewed
- I was not allowed to cross-examine the complainant
- Burden was put onto me to prove consent

Denial of A Process You Don't Offer

Representation

Discovery

Subpoena / compel witnesses

When a Party Refuses to Participate in the Process but Claims Due Process is Violated

“The Plaintiff waived his right to challenge the process resulting in his expulsion by failing to participate in the process afforded him.”

- Herrell v. Benson



Sometimes Institutions Do the Wrong Thing



- ❖ Missing deadlines for providing materials
- ❖ Misunderstanding of affirmative consent
- ❖ Errors at a hearing

Credibility Errors

If Complainant does not participate, can you judge credibility?

Do you need to see demeanor to note credibility?



Allegations for Bias

“Pro-victim bias does not equate to anti-male bias.”
-Doe v. University of Colorado

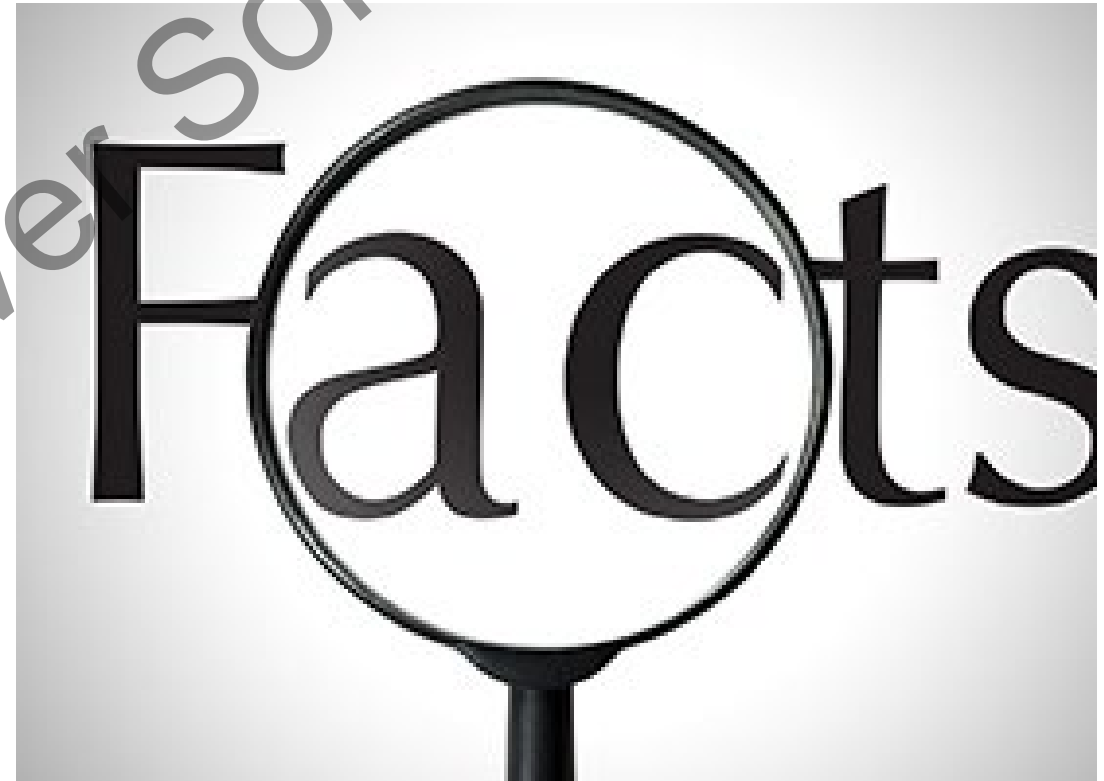
Anti-violence bias does not equate to anti-male bias.

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Allegations for Bias as the Basis for Appeal

An allegation of bias without factual support “no longer passes muster”.

-Doe v. University of Colorado



Sanctions Were Wrong

Is this a burden of production,
or persuasion?



Solutions When You Err

- ❖ John Doe v. University of Kentucky
- ❖ Doe v. Alger

Re-do and get it right.

Lesser-Included Charges on Appeal

There are no lesser-included charges.

Reflects lack of notice and opportunity to respond.

- Powell v. St. Joseph's University
- Doe v. U.S.C.

When a Sanction Changes Due to an Appeal

Appeals panel “sua sponte and without any explanation recommended enhancing the penalty to expulsion.”

Haug v. SUNY Potsdam

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Documenting the Appeal

Policy

- Rights
- How notified
- Who decides
- Step-by-step process
- Communications

Outcome

- Notification
- Decision
- Rationale
- Record-keeping
- Office of record

Questions?



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